FILED
FEB 3 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 460

CHARLES VAN BEECK, ADMINISTRATOR, ETC.,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET AL.,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT.

M. A. GRACE,
EDWIN H. GRACE,
DANIEL H. GRACE,
MILTON C. GRACE,
Counsel for Respondent.

New Orleans, La.

[illegible] PRINTING CO., NEW ORLEANS

INDEX.

PAGE

POINT ONE:

The Crcuit Court of Appeals did not err in holding that Charles Van Beeck, Administrator, was not entitled to recover the amount of damages which had accrued from the death of the son, Edward C. Van Beeck, to the death of the mother, Mrs. Jennie Royakers 1

Discussion of Authorities 3

Conclusion 18

INDEX OF CASES.

Bellingsley v. St. Louis, etc. R. Co.,84 Ark. 617, 107 S. W. 173 9

Caillouet et al. v. American Sugar Refining Co. et al. (D. C. E. D. Louisiana) 250 Fed. 639 5

Chicago B. & Q. R. Co. v. Wells-Dickey Co., 275 U. S. 161 2-5

City of Rome, The, 48 F. (2d) 333 (D. C. S. D. New York) 17

Cooper v. Shore Electric Co., 63 N. J. L. 558, 44 Atl. 632 13

Cortes v. Baltimore Insular Line, 287 U. S. 374 17

Cregin v. R. R. Co., 75 N. Y. 192 16

Doyle v. Baltimore & C. R. Co., 90 N. E. 165 10

Gerling v. Baltimore & O. R. Co., 151 U. S. 673 3-6

Gilkison v. Missouri Pac. Ry. Co., 222 Mo. 173, 121 S. W. 138 7

Lindgren v. United States, 281 U. S. 34 18

Martins' Administrators vs. Blto. & Ohio R. R. Co., 151 U. S. 673 2-6

Meekin v. Brooklyn H. R. R. Co., 164 N. Y. 145, 58 N. E. 50 15

INDEX OF CASES—Continued

PAGE

Michigan C. R. Co. v. Vreeland, 227 U. S. 59 4-6

Sanders' Adm'x v. Louisville & N. R. Co. (C.C.A. 6) 111 Fed. 708 6

Schmidt v. Menasha Wooden-Ware Co., 99 Wis. 300, 74 N. W. 797 11

Schreiber, In re., 110 U. S. 76 4

Shawnee v. Check, 41 Okla. 227, 137 Pac. 724 15

Sider v. General Electric Co., 238 N. Y. 64, 143 N. E. 792 15

Union Steamboat Company v. Chaffins' Administrator (C.C.A. 7) 204 Fed. 412 16

Woodward v. Chicago, 23 Wis. 400 10

STATUTES

Death of Parties; Substitution of Executors or Administrators, 28 USCA 778 5

Employers' Liability Act, 45 USCA 51 4

Merchant Marine Act of 1920, 46 USCA 686 4

Supreme Court of the United States

OCTOBER TERM, 1936

No. 460

CHARLES VAN BEECK, ADMINISTRATOR, ETC.,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET AL.,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT.

This Court granted a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit, limited to the question of whether cause of action under the Merchant Marine Act, Sec 33, commonly known as the Jones Act (46 USCA 688), abated with the death of the mother of Edward C. Van Beeck.

The United States Circuit Court of Appeals for the Fifth Circuit, in affirming the action of the District Judge in disallowing a Commissioner's award to the mother, said:

> "The cross appeal is taken to the rejection of a claim filed by Mrs. Jennie Royackers as adminis-

tratrix to recover damages for the death of her son, Edward C. Beck, who was second mate on the Coney. It appears from the stipulation in the record that Edward C. Van Beck left surviving him his mother and a brother aged 34. After filing the claim his mother died in July, 1931, before an award had been recommended by the commissioner. The brother Charles Van Beck, qualified as administrator of the estate of his mother and was substituted in place of his mother, the former administrator. Cross appellant contends that judgment should have been granted for the amount recommended by the commissioner, $700.00.

"The statute (T. USCA §51) creates three classes of beneficiaries, (1) the surviving widow or husband and children of the employee, (2) the employee's parents and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and non-dependent collaterals are not entitled to recover. Before the passage of the Merchant Marine Act there could be no recovery for damages for the death of a sailor occurring on the high seas. Nor could there be any recovery for damages for death of a common law. In *Martin's Administrator v. Blto. & Ohio R. R.*, 151 U. S. 673-703, an action was brought by Martin to recover damages for personal injuries to himself. A verdict was directed for defendant. Pending an appeal, Martin died and his administrator was substituted. On suggestion of his death, in the Supreme Court, it was held that the action abated by the death of the injured party, under the law of Virginia, where the action was brought, and that the administrator had no right to maintain the action. In *Chicago, Burlington & Quincy R. R. Co., v. Wells-Dickey Trust Co.*, 275 U. S. 161, it was held that the liability is to one of the three classes named in the act and not to the several classes collectively; and if the person entitled to recover at the time of the employee's death dies before a recovery of

the compensation, the cause of action dies also.

"There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the sole beneficiary entitled to recover, to the exclusion of all others. It is clear there could be no recovery on this claim." (R. p. 43, 44).

In support of the foregoing statement of law that such an action abates on the death of the beneficiary, we refer the Court to the following:

In the case of *Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 38 L. ed. 311, this Court, at page 318, said:

"By the Judiciary Act of September 24, 1879, chap. 20 §31 (1 Stat. at L. 90) following the statute of 8 & 9 Wm. III. c. 11 §§6, 7, and since embodied as follows in the Revised Statutes, 'when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment,' and upon *scire facias* judgment may be rendered for or against him; * * *

"These statutes authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives by law, and do not undertake to define what those cases are.

"The question whether a particular cause of action is of a kind that survives for or against the personal representative of the deceased person is a question not of procedure, but of right. As was said by Chief Justice Waite, speaking for this court: 'The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account

> of which the suit was brought, is one that survives by law. Rev. St. §955.' 'The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. Stat. §914. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it.' *Re Schreiber,* 110 U. S. 76, 80 (28:65,66). In that case, the right in question being of an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. * * * *"*

The following cases support the same view:

Exparte: In the Matter of *Francis Schreiber,* 110 U. S. 76;

Michigan C. R. Co. v. Vreeland, 227 U. S. 59;
Sanders Adm'x v. Louisville & N. R. Co. (C. C. A. 6) 111 Fed. 708.

The substance of the cause of action now before the Court is governed by the Merchant Marine Act of 1920 (46 USCA, Section 688), and usually referred to as the Jones Act. The Employers' Liability Act (45 USCA, Section 51) was embodied in the Jones Act by reference, and the statute known as Death of Parties; Substitution of Executors or Administrators is embodied in 28 USCA, Section 778. (These statutes are set out for the convenience of the Court in the appendix hereto.)

It will be noted that both the Merchant Marine Act and the Employers' Liability Act are silent as to the survival of the right of action of a deceased beneficiary.

This Court, in the case of *Chicago B. & Q. R. Co. v. Wells-Dickey Co.*, 275 U. S. 161, in speaking of the Act now before the Court, at page 164 says:

> "There are thus, three classes of possible beneficiaries. But the liability is in the alternative. It is one of the three; not to the several classes collectively. * * * The statute does not provide for a life interest in one, with remainder over to others in the line of distribution. Nor does it provide for vesting the right to compensation in the one, with a conditional limitation to another, in case the one entitled at the death happens to die thereafter without having secured recovery."

The Statute concerning Death of Parties: Substitution of Executors or Administrators, provides only that:

> "When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, *in case the cause of action survives by law,* prosecute or defend any such suit to final judgment." (Italics ours).

Such being the situation here presented, we refer to the case of *Caillouet et al. v. American Sugar Refining Co. et al.* (D. C., E. D. Louisiana) 250 Fed. 639. Foster, District Judge, now presiding Judge of the Circuit Court of Appeals for the Fifth Circuit, in speaking of the cause of action for damages under the Sherman Law, at page 640, says:

> "The Sherman Law is silent as to the survival of the right of action. As there is no other statute of the United States in point, whether the action

> survives or not must be determined by the principles of the common law, regardless of the law of Louisiana. Schrieber v. Sharpless, 110 U. S. 80, 3 Sup. Ct. 423, 28 L. ed. 65; Michigan Central R. R. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176."

In referring to the common law we refer to the case of *Gerling v. Baltimore & O. R. Co.*, 161 U. S. 673, 38 L. Ed. 311, wherein this Court, at page 320, said:

> "By the rule of common law, *actio personalis moritur cum persona*, the death of the sole plaintiff or of the sole defendant before final judgment abated any personal action, except that, if the death occurred in vacation after verdict, judgment might be entered as of the preceding term. * * "

The following cases support the same view:

Michigan C. R. Co. v. Vreeland, 227 U. S. 59;

Martin's Administrator vs. Blto. & Ohio R. R., 151 U. S. 673-703;

Sanders' Adm'x v. Louisville & N. R. Co. (C. C. A. 6th Cir.) 111 Fed. 708.

This Court, in speaking of the Employers' Liability Act (which was incorporated in the Merchant Marine Act by reference), in the case of *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 74, 57 L. ed. 417, at page 421, says:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act §124; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 231, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; Read v. Great Eastern R. Co.

L. R. 3 Q. B. 555; 9 Best. & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; Hecht v. Ohio & M.R.Co.132 Ind. 507, 32 N. E. 302; Fowlkes v. Nashville & D. R. Co. 9 Heisk. 829; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L. R. A. 694, 36 S. E. 881.

"The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. * * * "

In *Calliout et al vs. American Sugar Refining Co. et al. supra*, the Court held:

"At common law as a general rule all actions *ex delicto* abate with the death of either party. * * * *"

In the case of *Gilkison v. Missouri Pac. Ry. Co.*, Supreme Court of Missouri, 222 Mo. 173, 121 S. W. 138, the court, in considering their statutory laws with respect to survival of actions, that is, their statute providing that whenever a person dies from such wrongful act of another as would have entitled the person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, nothwithstanding the death of the party receiving the injury. And also their statute providing that for all wrongs done to property, rights, or interest of another for which an action might be maintained against the wrongdoer such action may be

brought by the person injured or after his death by his executor or administrator against such wrongdoer. The court held that the cause of action of the beneficiary died with her because there was no statute surviving same as the wrong was to the social and domestic relations of persons, a civil wrong or tort, and not a property right which would come under their survival of action statute. The Court, in discussing this point, at page 145, says:

> "But that case, like all of the others relied upon by respondent's counsel, ignored the distinction between the laws that govern rights of property. The former govern, among other rights, the social and domestic relations of persons, while the latter control the rights of property. The violation of the former is not a violation of a property right, but is the violation of a social duty or a wrong done to the domestic relations. A wrong done to society is denominated by a misdemeanor or a crime, and those to the domestic relations and to property *are called civil wrongs or torts.* The former is punishable by imprisonment or fine, payable to the state; and the latter is generally righted by the wrongdoer paying the damages done by him to the injured party. (Italics ours).
>
> "By applying these observations to the case at bar, we would convict appellant of violating the domestic relations of respondent's intestate—that is, of wrongfully taking the lives of deceased father and mother, and thereby deprive him of his legal rights to have his parents to care for, support, and educate him, for which he is entitled to recover pecuniary damages in dollars and cents—but it would clearly be a misnomer to say, nor could it be logically contended, that the wrongful killing of deceased parents was a wrong done to his property or to his property rights. It would be just as logical to say the wrongful killing of the husband would be a wrong and injury to the

wife's property rights, and that, upon her death, the cause of action given to her by said section 2864 and 2865 would upon her death under said section 96 survive in favor of her executor and administrator, yet every court in Christendom so far as my knowledge and investigation has gone, are unanimous in holding, under those statutes, her cause of action does not survive but abates with her death. But, if the minors cause of action, which is given by the same statute that gives to the wife hers, does not abate with the former's death, then by what process of reasoning can it be logically contended that the wife's cause of action abates upon her death? Certainly such an argument cannot be based upon the ground that the husband did not owe the wife the same care, support, and maintenance that he and his wife owed to their minor children. Under our laws, not only does he owe her the same duty, but, if he does not perform it, she may sue for and compel him to properly care for and support her, just as their minor children may do; and not only that, but so grave is the offense of the husband in not caring for and supporting his wife she may on that account sue for and obtain a divorce from him. Could it be seriously contended that the wrongful killing of a woman's husband is an injury to her property rights? I think not; yet she is just as much entitled to the care, society, and support of her husband as are his minor children. According to all laws, excepting the cases before considered, the unlawful killing of a husband or father is a wrong done to the personal rights of the wife and the child, and not to their property rights. * * "

Likewise, the Supreme Court of Arkansas, in the case of *Bellingsley v. St. Louis, etc. R. O.*, 84 Ark. 617, 107 S. W. 173, held that:

> "Such rights as arise out of the domestic relations are not property."

In the case of *Woodward v. Chicago,* 23 Wis. 400, the Supreme Court of Wisconsin held that such an action as here presented was an action of tort. The court, in referring to this point said:

> "The statute of this state reads as follows: 'And the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recoverable shall be paid over to his or her lineal descendents, and to his or her lineal ancestors in default of such descendants; and in every action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section.'
>
> "It being, therefore, an action of tort, and the sole party in interest having died, the next inquiry is, whether it falls within the general rule of the common law, that such an action does not survive the death of the party in whose favor it existed. It is very clear to our minds that it is not distinguishable in this particular from other actions of tort, and that the common law must govern, unless it has been taken out of the operation of that rule by some express provision of statute. We know of no such provision. * * * The provisions of statutes allowing actions of tort to survive are strictly construed, so as not to extend the exceptions beyond the clear intent of the legislature."

In the case of *Doyle v. Baltimore & O. R. Co.,* 90 N. E. 165, the Supreme Court of Ohio, in speaking of the right of action of the widow for the wrongful death of her husband, at page 168, says:

> "It would seem from the consideration of the entire record, that, the statute having given the right of action in this case for the exclusive benefit of the widow, that right in her could neither ascend to her mother, or cross over to the collateral heirs of her deceased husband, unless the statute so provides; and it does not so provide."

In *Schmidt v. Menasha Wooden-Ware Co.*, 99 Wis. 300, 74 N. W. 797, the Supreme Court of Wisconsin, in considering its wrongful Death Statute, says:

> "Under the common law, the right to prosecute the defendant for its alleged negligence in causing the death of Schmidt did not survive. But the wisdom of the legislature has provided that the offending party shall not escape responsibility. Section 4255, 4256 Rev. St. give a new action, in this case, to the widow, and a right to recover such damages as the jury may deem fair and just in reference to the pecuniary loss to her resulting from such death. The damages that could be recovered are limited to a mere indemnity for the resulting injury to the widow (citing authorities). Such damages do not go to the estate of the deceased but to the beneficiary named in the statute. * * * The theory of the statute as interpreted by decisions is that certain beneficiaries named therein, who have sustained an injury by reason of wrongful death, are entitled to be recompensed for the actual loss sustained. The fact that certain beneficiaries named therein take to the exclusion of others would seem to indicate that the legislature never intended that the provisions should inure to the benefit of persons not named therein. It is in harmony with this construction that this court held in he Topping Case that a complaint was demurrable that did not show that there were beneficiaries in existence who had sustained some pecuniary injury resulting from death. * * * The right of recovery, therefore, is

personal, and dependent upon pecuniary loss. Moreover the action must be brought by and in the name of the personal representative of such deceased person. There is no authority for its maintenance by any other person. * * * This court held in a very similar case that upon the death of the real party in interest, the action abated, and could not, in absence of a statute saving the right, be further prosecuted. Woodward v. Railway Co. 23 Wis. 400. That case is decisive of this appeal."

In the case of *Sanders' Adm'x v. Louisville & N. R. Co.* (*C. C. A. 6th Cir.*) 111 Fed. 708, in speaking of the Statute of Tennessee for negligent death, at page 709 says:

"The right of action in the state of Tennessee for the negligent death of a human being is purely statutory. We must therefore look to the statute to determine when and in whose favor the right of action survives, and by whom such an action may be brought. * * "

And at page 711 further says:

" * * The case of Railroad Co. v. Bean is more in point, and is decisive of the question. The action was by the administrator of the deceased for the use and benefit of a judgment for the plaintiff. The defendant sued out a writ of error, pending which the widow died. A motion was made in the supreme court to abate the suit because of the death of the widow, who was sole beneficiary and the real plaintiff. The court said:

" 'We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery at the death of deceased, when the cause of action accrued. In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator for her benefit. The right of recovery having once vested in the widow, it did not

> pass upon her death to her personal representative; neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished. ' "

The foregoing authorities and statutes of the United States show clearly that the death of the beneficiary abated the action as there was no survival of the beneficiary's action either by statute or at common law. The authorities further show that the statute under consideration provided for designated beneficiaries for whose use the action was to be prosecuted to the exclusion of all others. The decision of the Circuit Court of Appeals holding that the action abated on the death of Mrs. Jennie Royakers is in accordance with the decisions of this Court, the Circuit Court of Appeals of the Sixth Circuit, and the foregoing decisions of the State Courts.

The petitioner's contention that the Circuit Court of Appeals, in its holding is in conflict with the established law is not sustained. In referring to the cases quoted from in petitioner's brief, we desire to point out that in those decisions the courts not only referred to their "Death by Negligent Act Statute" but also to another statute of the State providing for "Survival of Action in Case of death."

In the case of *Cooper v. Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 632, quoted from by petitioner, the Court of Errors and Appeals of New Jersey had before it a statute of their state with respect to survivorship of actions. In speaking of the statute the Court, at page 634, says:

> "The efficient words of this statute are, 'trespass to the person or property, real or personal.'

> For such an injury the statute provides that the action shall survive to and against personal representatives."

The Court further, in speaking of this statute, says:

> "In the first of these cases it was said by Chief Justice Beasley that this act is highly remedial in its character: 'Its intent was to relieve against the harsh injustice of the old rule, *actio personalis moritur cum persona.*' * * * The statute, therefore, is to be liberally construed, so as to advance the remedy for this imperfection.' The Chief Justice, in his opinion, declared that the word 'trespass', in its comprehensive signification, embraced every infraction of a legal right. 'In this sense it comprehended not only forceable wrongs where the damages were direct and immediate, but also acts and consequences of which made them tortious.' * * * In my opinion, the word trespass, as used in the section under consideration, must be received as equivalent in meaning to the word 'tort,' so that the effect of the provision is to give a right of suit against the personal representatives of a deceased wrongdoer for any injurious act of a suable nature, without reference to the form in which the remedy must be sought."

The court further stated that the above referred to Act did not give a remedy for injuries resulting from the death of a person, stating that this imperfection in the law was remedied by a later statute, the New Jersey Death by Wrongful Act, the Court after considering this statute, giving a right to designated beneficiaries of the deceased person, again refers to the survival of action statute first above referred to and at page 636, says:

> "His right to be compensated for the pecuniary injury sustained was such a property right as, under the legal principles that controlled in the construction of the preceding statute, would give

> the cause of action the quality of survivorship, and take it out of the maxim, '*actio personalis moritur cum persona.*' By the machinery adopted by this statute for the enforcement of this pecuniary injury, such suit would survive to the personal representatives of the first deceased."

In the case of *Shawee v. Check*, 41 Okla. 227, 137 Pac. 724, quoted from by petitioner, the Court, in considering the question presented in the instant case, had before it not merely their death by wrongful act statute, but also their survival of action statute. The court in speaking of this statute says:

> "Section 4312 Stat. 1893 (section 5280, Rev. Laws 1910), reads: No action pending in any court shall abate by the death of either or both of the parties, thereto. * * *
>
> "But we do not understand this section to impart the quality of survivability to causes of action which do not have that quality under the next preceding section (section 4311, Stat. 1893, same being section 5279, Rev. Laws 1910) which reads: In addition to the causes of action which survive at common law, causes of action for mense profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

In the case of *Sider v. General Electric Co.*, 238 N. Y. 64, 143 N. E. 792, quoted from by petitioner, is a case arising under the New York law. This case refers to *Meekin v. Brooklyn H. R. R. Co.*, 164 N. Y. 145, 58 N. E. 50. In this latter case the court says:

> "Creigin v. R. R. Co. 75 N. Y. 192, 194, the court said: 'The rights and interests, for tortious injuries to which this statute preserves the right

> of action have frequently been considered; and it is generally conceded that they must be pecuniary rights or interest by injuries to which the estate of the deceased is diminished.' "

In the case of *Cregin v. R. R. Co.*, 75 N. Y.192, the Court refers to the New York survival of action statute and says:

> "Section 1 preserves from abatement by death, actions 'for wrongs done to the property, rights, or interest of another.' This language is very broad and embraces a large class of actions. It is not confined to direct injuries to property, but includes all injuries to the rights or interest of a deceased party, except such as are enumerated and exempted in the following section: No. 2. These are, actions for slander, libel, assault and battery, false imprisonment and actions on the case for injuries to the person of the plaintiff. These exceptions necessarily prevent the surviving of any action for slander, libel or assault, and battery or false imprisonment, or for any injury to the person of any deceased plaintiff, however seriously such injury may have affected his property or estate. But they do not cover an action for a wrong done to his rights or interests, even though this wrong may have been effected by means of an injury to the person, provided the injury was not to the person of the plaintiff, but some other party."

The statute preserving rights and interest for tortious injuries:

In the case of *Union Steamboat Company vs. Chaffins' Administrators*, 204 Fed. 412, (C. C. A. 7th Cir.) quoted from by petitioner, the court followed the New York Rule as decided in the case of *Meekin v. Brooklyn H. R. Co.*, 164 N. Y. 145, 58 N. E. 50, which we have previously shown was decided on the statute of survival of

action statute of New York, and not merely on the Death by Wrongful Act statute.

There is therefore nothing in the preceding cases above referred to, that would have any bearing upon the case now before this Court, which concerns the interpretation of the Merchant Marine Act of 1920 at 46 USCA Section 688, and usually referred to as the Jones Act. The Employers' Liability Act (45 USCA Section 51) which was embodied in the Jones Act by reference and Death of Parties, Substitution of Executor or Administrator. (28 USCA Section 778.)

In the case of *The City of Rome*, 48 F. (2d) 333, District Court S. D. New York cited by Petitioner, and holding that the action did not abate on the death of the beneficiary, merely followed the authorities of the State of New York and New Jersey, which authorities we have hereto shown were decided not simply upon the "Death by Negligent Act Statute" but also on another statute of the State with respect to the survivability of actions. Such holding in the above case is therefore clearly not a determination of the question now before this Honorable Court, as is stated in *Taylor v. Taylor*, 232 U. S. 363, at page 370:

> "It is clear from these decisions that the source of the right of plaintiff in error was the Federal Statute."

The statute herein is designed and intended in aid of seamen, and those dependent upon their earnings. As to this, this court in *Cortes v. Baltimore Insular Line*, 287 U. S. 374, 376', 77 L. ed. 373:

> "This Court has held that the Act (the Jones Act) is to be liberally construed in aid of its beneficent purpose to give protection to the seaman,

and to those dependent on his earnings." (Italics ours.)

The statute is not aimed or intended as an estate rights of the deceased, *Lindgren v. United States,* 281 U. S. 38; nor of the estate of a beneficiary, but as stated, it was intended purely as a personal aid in case of death to the beneficiaries dependent upon his earnings. In the instant case, the Administrator, as substituted, is making no claim on behalf of anyone who was dependent upon the earnings of the deceased. We therefore respectfully submit that neither under the Federal Statutes, nor at common law, does the action in the instant case survive the death of the beneficiary.

We therefore pray that the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

M. A. GRACE,
EDWIN H. GRACE,
DANIEL H. GRACE,
MILTON C. GRACE,
Counsel for Respondent.

New Orleans, La.

APPENDIX.

46 USCA §688:

Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 5, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.)

45 USCA Section 51:

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal rep-

resentative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, §1, 35 Stat. 65.)

28 USCA §778:

Death of parties; substitution of executor or administrator. When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any suit to final judgment. The defendant shall answer accordingfily, and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its *scire facias* to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof. No executor or administrator shall be made a party unless such service is made before final settlement and distribution of the estate of said deceased party to the suit.

This section shall apply to suits in which any party has deceased prior to November 23, 1921, as well as to suits in which any party may have died thereafter or may die hereafter. (R. S. §955; Nov. 23, 1921, c. 142, §§1, 2, Stat. 324*; Dec. 22, 1921, c. 18, 42 Stat. 352.)

---

*"Stat. 324" should read "42 Stat. 323, 324."